

Under the relevant DOJ standard, a prosecutor should not bring a case simply because she believes that there is probable cause to obtain an indictment or that there is sufficient evidence to survive a motion for judgment of acquittal under Rule 29(a) of the Federal Rules of Criminal Procedure. Instead, a prosecutor should only recommend a prosecution

if he/she believes that the person's conduct constitutes a Federal offense and that the admissible evidence will probably be *sufficient to obtain and sustain a conviction*.⁷²⁶

This DOJ standard requires that the prosecutor believe that "the person probably will be found guilty by an unbiased trier of fact."⁷²⁷

For the casino decision to have been criminally corrupted, the parties involved would have to have violated some criminal law, not simply transgressed a prosecutor's sense of what is appropriate lobbying or political activity. In evaluating the conduct of the casino opponents and their lobbyists, due deference was paid to two protections afforded by the First Amendment to the U.S. Constitution: (1) a citizen's right to petition the government,⁷²⁸ and (2) the freedom of

⁷²⁶United States Attorneys' Manual (USAM) § 9-27.220(A) (Sept. 1997) (emphasis added). That section further provides that even if that evidentiary standard is met the prosecutor need not commence or recommend federal prosecution if, in the prosecutor's judgment, prosecution should be declined because (1) no substantial federal interest would be served by prosecution; (2) the person is subject to effective prosecution in another jurisdiction; or (3) there exists an adequate non-criminal alternative to prosecution. USAM § 9-27.220.

⁷²⁷*Id.* at § 9-27.220(B).

⁷²⁸We are particularly mindful that this right applies with equal vigor to paid lobbyists. "While, for some, the term 'lobbyist' has become encrusted with invidious connotations, every person or group engaged . . . in trying to persuade Congressional action is exercising the First Amendment Right of petition." *Liberty Lobby v. Person*, 390 F.2d 489, 491 (D.C. Cir. 1968). *See also United States v. Sawyer*, 85 F.3d 713, 731 n.15 (1st Cir. 1996) ("as with all lobbyists, [the defendant's] employment goal was to persuade and influence legislators to benefit certain interests. Such endeavors, however, are protected by the right 'to petition the Government for a

(continued...)